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**SUPREME COURT OF THE
UNITED STATES**

No. 141

**HIGHWAY CONSTRUCTION COMPANY OF OHIO,
INC.,**

Petitioner,

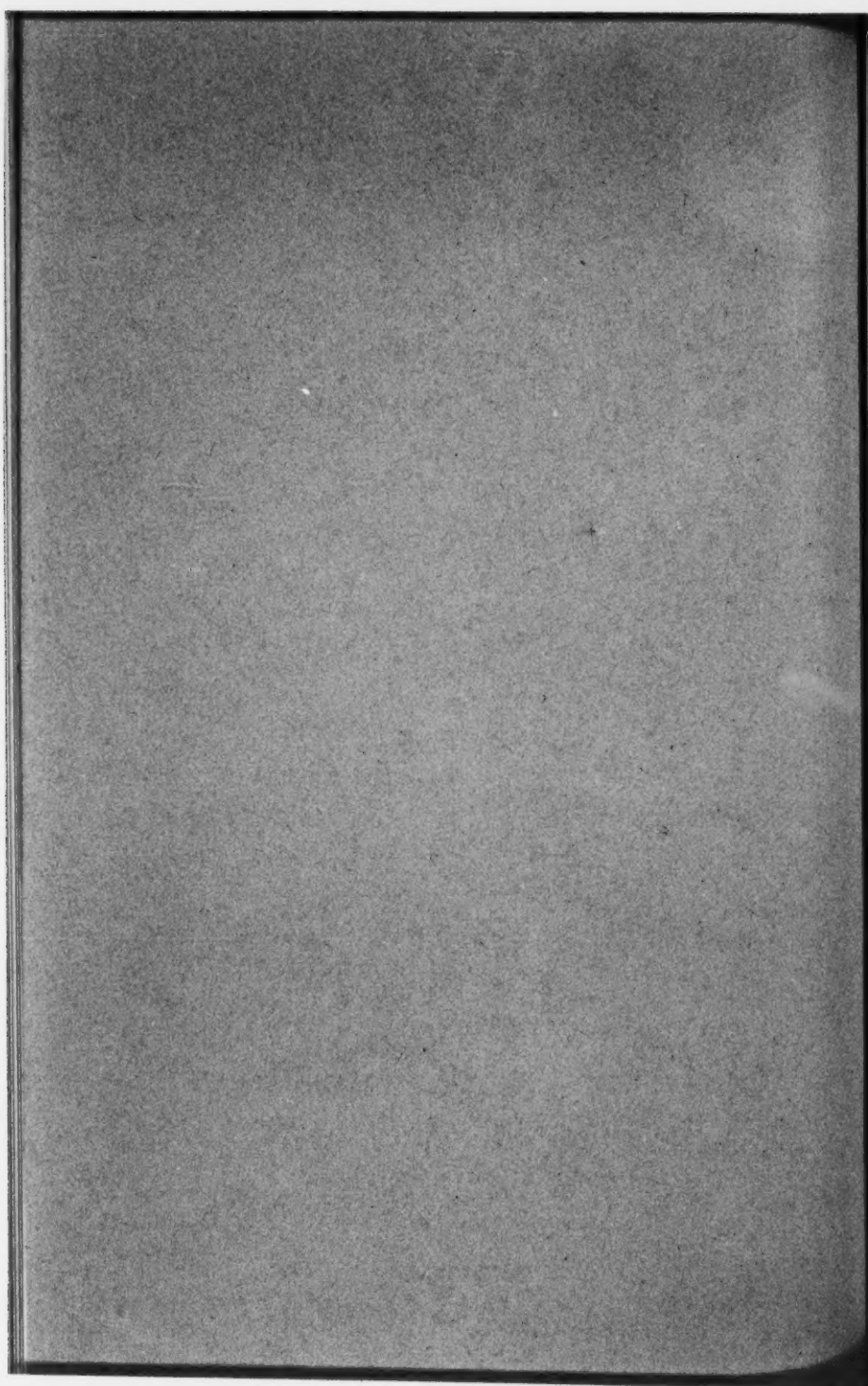
vs.

CITY OF MIAMI, FLORIDA,

Respondent

**BRIEF OF RESPONDENT ON PETITION FOR
WRIT OF CERTIORARI**

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SIDNEY S. HOEHL**
Counsel for Respondent



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**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1942

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO,
INC.,

Petitioner and Plaintiff-
Appellant Below

vs.

CITY OF MIAMI, FLORIDA,

Respondent and Defendant-
Appellee Below

**BRIEF OF RESPONDENT ON PETITION FOR
WRIT OF CERTIORARI**

Introductory Statement

The filing herein of the petition for a writ of certiorari marks the fifth attempt by the petitioner to have its contentions and theories with respect to the instant cause approved in a Federal court. Those contentions and theories have already been rejected as illogical and unsound on four different occasions; first, by the Jury in the District Court; secondly, by the Judge in

the District Court when he denied petitioner's motion for a new trial; thirdly, by the Circuit Court of Appeals for the Fifth Circuit when, by unanimous decision, it held that submission to a jury of the matters in dispute had been entirely unnecessary inasmuch as "under the unambiguous terms of the contracts the City (respondent here) was entitled to judgment as a matter of law" (R. 4744); and fourthly, by the Circuit Court of Appeals when it denied the petition for rehearing (R.4778) in which the petitioner presented to the Circuit Court of Appeals every point, without exception, which it now presents to this Court as a basis for the issuance of a writ of certiorari.

There is in reality no Federal question involved in the instant cause, despite petitioner's argument to the contrary under Point C in its brief. The cause was filed in the United States District Court solely because the plaintiff (petitioner here) is an Ohio corporation and the defendant (respondent here) is a Florida municipality. Were there not this diversity of citizenship, the cause would have originated in a local state court and would have eventually been decided by the Supreme Court of Florida (with precisely the same result, we are convinced, as that which has been attained to date in the Federal courts), and in that event, we submit that there would patently be no basis upon which review by this Court could logically have been sought.

Summary Statement of Matter Involved

Although, in general, the petitioner's summary statement of the matter involved herein (petitioner's petition and brief, pages 1-4) is acceptable, there are nevertheless

a few statements therein which, in our opinion, require special comment.

On page 2 of its petition and brief, the petitioner states,

"The petitioner refused to accept the amount so found to be due by the City Engineer, for the reason that said estimates did not include any compensation for work performed and materials furnished on the order of the City Engineer in excess of the amounts and of the same kind as named in the Instructions to Bidders, and changes in the quantity or cost of work and material, consisting of claims for:" (and then follows a description of each of the kinds of alleged claims upon which the petitioner predicated its suit).

In and by the statement quoted, it is assumed and stated as an established fact that the petitioner did perform work and did furnish materials in excess of the amounts included in the final estimates prepared by the City Engineer,—an assumption and statement in direct conflict with the contentions of the respondent from the very inception of the dispute between the parties. The respondent has consistently maintained that the final estimates prepared by the City Engineer included, without exception, all work and materials for which the petitioner was entitled to payment, that there were no materials furnished or work done for which the petitioner would be entitled to compensation over and above the quantities included in the final estimates, that the total amount still due the petitioner upon the final estimates was \$23,263.15,

and that every claim of the petitioner is either based upon its misconception, misconstruction or misinterpretation of specifications or is based upon alleged orders of the City Engineer which were not in fact given or upon purported conditions which did not in fact exist. The petitioner was accorded every opportunity and the fullest latitude by the District Judge to present all of its theories and contentions to the Jury (although counsel for the respondent contended and the Circuit Court of Appeals has now confirmed the soundness of such contention (R. 4744) that the respondent City was entitled to judgment purely as a matter of law). The Jury awarded the petitioner \$23,263.15, the precise amount which the respondent had offered to pay to the petitioner immediately after the final estimates were prepared in 1927.

On page 4 of its brief, the petitioner states,

"The trial was by Jury. There is very little dispute as to matters of fact. The record will disclose that at least 90% of the testimony is nothing more than the opinions of witnesses as to how they think the contracts sued on should be interpreted, and argument between counsel and witnesses concerning such interpretation. The case, in the main, before the Jury was a dispute, not of fact but of interpretation, of the contracts and plans and specifications made a part thereof, which the trial court refused to construe and left the Jury free to put its own interpretation thereon."

This statement requires supplementary comment. While it is generally true that there was very little dispute as

to the quantity of materials used or the amount of work done under the seven paving contracts, yet there were a number of most pertinent conditions and circumstances with respect to the work which were matters of dispute and which were referred to the Jury, such, for example, as whether one or two inlet plans had been furnished to the petitioner, whether the City Engineer did, in fact, issue various kinds of orders, whether the petitioner was informed that local stone could be used, whether specific quarries were pointed out by the City Engineer as quarries from which stone should be procured, whether sewer plans were provided and used while the work was being done, whether the petitioner was compelled by the City Engineer to buy more costly materials from specific vendors, whether certain operating methods were employed by the petitioner voluntarily, and numerous other matters in support of or in refutation of the contentions of the respective parties. All of these matters in dispute were submitted to the Jury and its determination thereof no doubt constituted the basis of its verdict in favor of the respondent.

Jurisdictional Statement

Assuming, but denying, that the reasons relied on by the petitioner for the allowance of the writ of certiorari have merit (petitioner's petition and brief, pages 11-13), the statement of the petitioner as to the jurisdiction of this Court is acceptable.

The Questions Presented to the Circuit Court of Appeals for Decision

The statement of the petitioner as to the principal

questions which were presented to the Circuit Court of Appeals for decision (petitioner's petition and brief, pages 5-11) is sufficiently accurate to be acceptable to the respondent.

Reasons Relied On by Petitioner for Allowance of Writ

Since each of the five reasons relied on by the petitioner for the allowance of the writ is discussed at length under an appropriate point heading in that portion of petitioner's brief devoted to the argument, it will be similarly discussed hereinafter under the same point heading as that employed by the petitioner.

Petitioner's Specification of Errors of Circuit Court of Appeals

Each purported error of the Circuit Court of Appeals, as specified by the petitioner on pages 15-18 of its petition and brief, pertains to and is discussed under an appropriate point heading in that portion of petitioner's brief devoted to the argument; each such purported error will be similarly discussed hereinafter under the same point heading as that employed by the petitioner.

It is to be noted that every such alleged error of the Circuit Court of Appeals, as now specified by the petitioner to this Court, was also specifically cited by the petitioner as a ground for rehearing by the Circuit Court of Appeals (R.4753-4777), was unquestionably accorded the careful thought and consideration of that Court, and found to be lacking in merit (R.4778).

Moreover, it is fitting to invite the Court's attention

here and at this time to what, we submit, is a fundamentally erroneous theory which is reflected by the phraseology of the petitioner's specification of errors allegedly committed by the Circuit Court of Appeals.

That fundamentally erroneous theory upon which the petitioner instituted the instant cause and to which it has persistently adhered and still adheres despite consistently adverse findings and rulings in the District Court and in the Circuit Court of Appeals, is that the work which it allegedly did and the materials which it allegedly furnished, over and above the work and materials included in the final estimates, constituted "additional" work and materials, rather than "extra" work and materials. The development of and adherence to this theory was essential to the petitioner's potential right to initiate and maintain its suit, inasmuch as the contracts under which all work was done and all materials were furnished distinguished between "additional" work and materials and "extra" work and materials, and provided, *inter alia*, that "no claims whatever for extra work will be considered or paid, except only when ordered in writing by the Engineer at a price stated in the order" (R.4134), and the petitioner being unable to produce any written orders signed by the City Engineer in support of its alleged claims, therefore found it necessary to develop and to build up and to prosecute its entire case upon the theory that its alleged claims pertained to "additional" work and materials and not to "extra" work and materials.

Consequently, the petitioner's "Specification of Errors of Circuit Court of Appeals" is phrased throughout in language reflecting such theory,—a theory which the Jury

by its verdict rejected, which the District Judge refused to accept, and which the Circuit Court of Appeals recognized as fallacious when it stated in its opinion, "The Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work" (R.4742).

Petitioner's Point A

The first of the five reasons on which the petitioner relies for the allowance of the writ of certiorari (petitioner's petition and brief, pages 11-12 and 19-20) is that the decision of the Circuit Court of Appeals in holding that the trial court's refusal to interpret to the Jury the unambiguous provisions of the contracts sued on was harmless error, so far departs from the accepted course of judicial proceedings, or so far sanctions such a departure by the lower court, as to call for an exercise of supervisory power by this Court.

We do not deny the existence of the general rule of law that it is the duty of the court to construe unambiguous contractual provisions, but we do deny that the Circuit Court of Appeals neglected to perform such duty in the instant cause.

The petitioner, in support of its point under discussion, cites the case of *City of Orlando, Florida v. Murphy*, 84 F. (2d) 531. It is well to note that participating in the decision thereof were Judges Sibley and Holmes, two of the three Circuit Court Judges who held in the instant cause that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law"

(R.4744). Certainly there is no expression in the opinion filed in the instant cause which would suggest that Judges Sibley and Holmes had performed their judicial duties herein in a manner inconsistent with what they had declared the duty of the court to be in the *Orlando* case.

On the other hand, although the Circuit Court of Appeals did state in the instant cause that the District Court had "declined to construe and pass upon the different sections of the contracts, except in one or two instances", the Circuit Court of Appeals by no means approved the neglect of the trial court to perform its duty in this respect, declaring instead that "the (District) court should have decided what portions of the contract, if any, were doubtful, and should have ruled out all oral conversations, promises, or corrections, except what was truly an explanation of a doubtful expression in the writings" (R. 4742).

Of course, a complete answer to the petitioner's argument in support of its Point A is that the Circuit Court of Appeals itself performed the duty which it found that the District Court had not fully performed, that is, it construed, interpreted and passed upon the pertinent sections of the contracts and, having done so, concluded that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law" (R.4744).

That the Circuit Court of Appeals did in fact construe and pass upon the controlling provisions of the contracts is irrefutably established by its opinion filed herein (R. 4737-4745). In that opinion there is quoted at length

excerpts from six different numbered sections of the contracts and also a complete section of the City Charter prescribing the conditions which must be observed when contracts for public work are altered or modified. Immediately following these quotations, the Circuit Court of Appeals stated (R.4741-4742):

"If we but follow the clear and unambiguous terms of the seven contracts, and strip away the long and tedious pleadings, the issues become patent and are in no wise confusing."

* * * * *

"The provisions of the Charter of the City of Miami, the instructions to bidders, and the express terms of the several contracts make it exceedingly clear that the parties intended, agreed, and understood that their contracts were to be fully written. The contracts as written were not subject to change, contradiction, or variation by parol evidence. Therefore, the voluminous evidence as to what transpired between the parties before the contracts were signed was immaterial."
(Citing authorities)

And the subsequent portions of the Court's opinion are likewise replete with references to specific provisions of the contracts and to the legal effect of such provisions,—conclusive evidence that, irrespective of what the District Court may or may not have done, the Circuit Court of Appeals cured such deficiency, if any, and fully discharged

any judicial obligation which may have prevailed to construe and rule upon relevant sections of the contracts.

It follows that the first of the five reasons relied upon by the petitioner for the allowance of the writ is wholly without merit.

Petitioner's Point B

The second of the five reasons on which the petitioner relies for the allowance of the writ (petitioner's petition and brief, pages 12 and 20-24) is that the decision of the Circuit Court of Appeals, by "holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner, in the absence of bad faith, fraud or deceit of the engineer (R.4744), is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and is a decision also in conflict with the decision of the Circuit Court of Appeals for the First Circuit on substantially the same matter."

The decision of the Circuit Court of Appeals for the First Circuit with which the decision in the instant cause is alleged by the petitioner to be in conflict, was rendered in the case of *Gammino v. Inhabitants of the Town of Dedham*, 164 F. 593.

That case was cited by the petitioner on page 328 of the brief which it filed, as appellant, in the Circuit Court of Appeals; it was again cited by the petitioner in its petition for rehearing (R.4769) filed in that Court; wherefore,

it is reasonable to presume that the *Gammino* case having been brought specifically to their attention on at least two different occasions by the petitioner, the Circuit Court of Appeals Judges in deciding the instant cause must have given proper consideration to the cited case and must have been of the opinion that the decision therein was not in conflict with their decision here.

And indeed, an examination of the opinion in the *Gammino* case discloses immediately that the factual situation and the contract provisions therein are entirely different from those controlling in the instant cause.

In the *Gammino* case, prices had been secured and a contract awarded upon an estimated proportion of rock and earth excavation, with a 25 per cent margin of variation, for two described sewer improvements. In the prosecution of the work, it was found that the quantity of rock to be excavated was appreciably more and the quantity of earth correspondingly less than the estimate upon which prices had been obtained, although the total quantity of work to be done, namely, the completion of the two described sewer improvements, was unchanged.

The question before the Circuit Court of Appeals for the First Circuit in the *Gammino* case, therefore, was whether the contractor should be restricted to the contract price predicated upon an erroneous estimate made by the Town of Dedham prior to the submission of bids. The Court held that the contract price governed only to the extent covered by the estimates upon which bids were prepared, with a 25 per cent margin for variation, and that "it was the intention of the parties, in case the

quantities exceeded the estimates by more than 25 per cent, that the contractor might claim on quantum meruit for the balance”.

Certainly there has been no similar question raised or decided in the instant cause, and therefore the only conceivable basis for the assertion by the petitioner that the decision herein conflicts with that rendered in the *Gammino* case is the inclusion in the opinion filed in the latter case of the statement quoted on page 21 of petitioner's brief. But that statement appears at the very end of the lengthy opinion in which the Court has discussed the admissibility of oral testimony varying the terms of a written instrument, the admissibility of evidence relating to customs and usages, and a number of other matters not affecting its decision. The statement relied upon by the petitioner as establishing a conflict between decisions of two Circuit Courts of Appeals was obviously dictum, a mere comment by the Court upon the following provision of the contract involved:

“In case of any dispute arising the engineer shall have the right to settle the same, and he shall have the right to determine and interpret the meaning of these specifications and contract to be made under them, and all decisions of the engineer shall be final.”

There is nothing in the opinion of the Court in the *Gammino* case which would indicate that the charter of the Town of Dedham or the contract under consideration contained restrictive provisions with respect to alterations or modifications in the work to be done at all comparable

with those in the Charter of the City of Miami and in the contracts involved in the instant cause and quoted by the Circuit Court of Appeals (R. 4739-4741). We submit, therefore, that the assertion of the petitioner that the decision of the Circuit Court of Appeals herein is in conflict with the decision in the *Gammino* case, is wholly without merit.

Under its Point B, the petitioner also asserts that the decision of the Circuit Court of Appeals herein "is a decision of an important question of local law in a way probably in conflict with applicable local decisions", and relies upon the decision of the Supreme Court of Florida in the case of *Duval County v. Charleston Engineering & Contracting Co.*, 101 Fla. 810, 134 So. 509. That case was also cited by the Circuit Court of Appeals (along with three other cases decided by the Supreme Court of the United States, which the petitioner in its brief neglects to discuss) as authority for its holding that under the provisions of the contracts relating to the functions, duties and powers of the City Engineer, to all of which provisions the petitioner had agreed when it signed the contracts, the "decision of the engineer was to be binding upon the parties, and where, as here, the contractor violated the terms of the contract, and made no attempt to show that the engineer, the City, or its agent were guilty of bad faith, fraud, or deceit, it may not recover" (R. 4744). And then there immediately follows the statement by the Court that "on the facts now shown we are of opinion that under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law" (R.4744).

In support of its contention that the Circuit Court of

Appeals decided an important question of local law in a way probably in conflict with local decisions, the petitioner reiterates that there was very little dispute as to the facts. Our comments upon a similar assertion by the petitioner have already been set forth hereinbefore in the summary statement of matter involved, and consequently need not be stated again.

Despite petitioner's insistence to the contrary, the case of *Duval County v. Charleston Engineering & Contracting Co.*, *supra*, cited by the Circuit Court of Appeals herein, does beyond question fully support the decision of that Court that under the specific provisions of the contracts, the final estimates of the City Engineer would be binding upon both parties, in the absence of a showing of bad faith, fraud or deceit,—a showing which the petitioner has never undertaken to make herein. For in the *Duval County v. Charleston Engineering & Contracting Co.* case, the Supreme Court of Florida stated,—

“Where the contract contains provisions referring the estimate of the quantity and quality of the work absolutely to the determination of the Company's Engineer, or any particular party, and provides that his decision shall be final, no relief from his decision can ordinarily be obtained even in a Court of Equity, unless upon the ground of partiality or obvious mistake.” (134 So. 515)

And likewise in the head-note prepared by the State Supreme Court, the Court stated,—

“Whilst an engineer's certificate required by a

construction contract to show the amount and quality of work done as a condition to payment will not be regarded as conclusive and unassailable in all cases, yet it will be, without fraud or special showing."

The petitioner further contends that the authorities cited by the Circuit Court of Appeals are inapplicable in the instant cause because the respondent, by way of pleading in defense after petitioner instituted this cause, filed a counterclaim which it later abandoned, the contention of the petitioner being that by filing the counterclaim the respondent "completely abandoned that provision of the contracts upon which the Court of Appeals' decision is grounded" (petitioner's brief, page 23). And in support of this novel contention, the petitioner cites two Florida cases, *Campbell et al. v. Kauffman Milling Co.*, 42 Fla. 328, 29 So. 435, and *Mizell Live Stock Co. v. McCaskill Co.*, 62 Fla. 239, 56 So. 391. In each of those two cases, the Supreme Court of Florida merely declared that a plaintiff can not prosecute two inconsistent suits covering the same right of action, but must make an election, and there is not one word in the opinion of either case which would suggest that the Supreme Court of Florida meant thereby that it would deny to a defendant the legal right to abandon a plea during the progress of litigation under penalty of being adjudged thereby of having repudiated the provisions of a contract under seal. That the petitioner attached no significance to the abandonment of a defensive counterclaim by the respondent is established by the fact that by affirmative action taken by the petitioner itself (R. 2, items 7 and 11), the counterclaim was excluded from the printed record.

It is clear that the second of the five reasons relied upon by the petitioner for the allowance of the writ also lacks merit.

Petitioner's Point C

The third of the five reasons on which the petitioner relies for the allowance of the writ (petitioner's petition and brief, pages 12-13 and 25-27) is that "the decision of said Circuit Court of Appeals, by affirming the action of the trial court in asking the Jury, after they had deliberated and reported that they were hopelessly 'tied up' to where they could reach no decision (R.4092), how they were numerically divided (R.4093), and by holding that the error was lost to the petitioner, because of its failure to object or except to such action of the trial court (R. 4744), is a decision of an important Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States."

In support of its Point C, the petitioner cites two cases, *Brasfield v. United States*, 272 U. S. 488, and *St. Louis & S. F. R. Co. v. Bishard*, 147 Fed. 496, the first named being a criminal case, and in the second named case, a civil case, the Court points that an exception was preserved by the company to the action of the lower court in asking the jury how it was divided. Thus, neither case cited by the petitioner is in point here, since the instant cause is not a criminal case and no objection of any kind was made by the petitioner when the questioning of the Jury took place.

Moreover, there is no reason to believe that the verdict

of the Jury was influenced in any way by the District Judge's question as to how the Jury stood or by his remarks urging the Jury to endeavor to reach a verdict. In addition to such remarks, and at the request of two members of the Jury (apparently the same two who, until then, were not in accord with the others upon some of the counts), the District Judge read at length from charges which he had given theretofore (R.4099-4112) upon the consideration to be given to action taken by the City Commission or to findings made by the Auditor, and also upon the subject of interest. The statement by the Judge urging the Jury to endeavor to reach a verdict covers but one-half page in the printed record (R.4098); the charges which were reread immediately thereafter cover 12 pages (R.4099-4112). Certainly it is reasonable and logical to conclude that the verdict of the Jury was influenced by the further charges given at the request of the two jurors, rather than by the statement of the Judge that the Jury should endeavor to reach a verdict. And that the petitioner attached no significance whatsoever to the Judge's statement that the Jury should endeavor to reach a verdict is disclosed by the fact that its counsel made no protest of any kind with respect to such statement during the 2 hours and 20 minutes which intervened between the Judge's question as to the numerical division of the Jury and the publication of the verdict (R.4092 and R.4115), although counsel did object to the Court's recharge upon the subject of interest (R.4112). The fact that counsel objected to the recharge with respect to interest but failed to make any reference (although there was more than 2 hours time within which to do so) to the Judge's remarks relative to the desirability of reaching a verdict establishes

conclusively that counsel did not consider such remarks detrimental in any respect to the interests of his client, and that he raised the question only because he later learned that the language employed by this Court in the *Brasfield* case could probably be employed to his client's advantage.

But in the final analysis, it becomes wholly immaterial whether the Circuit Court of Appeals was or was not in error in stating that the petitioner had lost its right to object by failing to interpose a timely objection when the trial court asked the Jury how it was numerically divided. For, as the respondent has consistently contended, and as the Circuit Court of Appeals has now unequivocally decided and declared, "the City was entitled to judgment as a matter of law" (R.4744); wherefore, the case should have never reached the stage where it was submitted to a jury for consideration, and so, whether the District Judge was or was not in error in asking the Jury how it was numerically divided becomes a purely academic question.

Petitioner's Point D

The fourth of the five reasons on which the petitioner relies for the allowance of the writ (petitioner's petition and brief, pages 13 and 27-30) is that the "decision of said Circuit Court of Appeals, by holding that the respondent was entitled to judgment as a matter of law on the disputed claims of the petitioner under the unambiguous terms of the contracts sued on by petitioner (R.4744), so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of

supervision of the Supreme Court of the United States."

In its Point A, the petitioner asserts that unambiguous contractual provisions should have been, but were not, construed by the courts. And now in its Point D, it admits that such contractual provisions were in fact construed by the Circuit Court of Appeals but complains because the construction so undertaken and given by that Court led to the legal conclusion that the respondent was entitled to judgment herein purely as a matter of law.

The petitioner's entire argument in support of its Point D is predicated upon its fundamentally erroneous theory that its alleged claims relate to "additional" work and materials and not to "extra" work and materials.

We have discussed this fundamentally erroneous theory of the petitioner, and the reason therefor, hereinbefore in that portion hereof devoted to the petitioner's specification of errors of the Circuit Court of Appeals. We invite the attention of this Court to that discussion.

That the alleged claims of the petitioner were in reality for "extra" work and materials, as defined in the contracts, and not for "additional" work and materials, as also defined in the contracts, is well established by the evidence (R.3428-3431).

The petitioner cites, in support of its Point D, the case of *Wood et al. v. City of Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416. But that case relates to work that was done in compliance with and after specific authorization by trustees, in accordance with the provisions of the contract involved. In the instant cause, however, as the Cir-

cuit Court of Appeals (after remarking that "the Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work" (R.4742) found and stated, "the alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged additional work was done and materials furnished" (R.4743) as required by Section 54 of the City Charter. The case cited by the petitioner is not in point.

It is to be noted that in support of its Point D, the petitioner quotes excerpts only from paragraphs numbered 6, 7 and 9 in the contracts, and wholly fails and neglects to give any consideration to the equally controlling provisions of Section 54 of the Charter of the City of Miami and of paragraphs numbered 4, 5 and 13 in the contracts, charter and contract provisions cited by the Circuit Court of Appeals in its opinion (R.4739-4741) and which fully establish the soundness and correctness of the Court's decision that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law", a decision rendered after the Jury in the District Court had decided by its verdict that the City was entitled to judgment based upon the facts as well.

We submit that the fourth reason upon which the petitioner is relying for the issuance of the writ lacks merit.

Petitioner's Point E

The fifth and last of the reasons on which the petitioner relies for the allowance of the writ (petitioner's

petition and brief, pages 13 and 30-31) is that "the decision of said Circuit Court of Appeals, by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely questions of law, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States."

If the decision of the Circuit Court of Appeals that "under the unambiguous terms of the contracts the City was entitled to judgment as a matter of law on the disputed claims" is sound, it follows that petitioner's Point E is devoid of merit. For the alleged claims of the petitioner relating to grading are included among the "disputed claims" to which the Circuit Court of Appeals has referred, the only difference between the treatment accorded the alleged claims for grading and the treatment accorded the remaining "disputed claims" being that the District Court ruled out the grading claims "as a matter of law", whereas the remaining "disputed claims", although they also should have been ruled out by the District Judge upon legal grounds alone instead of being submitted to the Jury (which promptly rejected them), were ruled out "as a matter of law" by the Circuit Court of Appeals.

On page 31 of its brief, petitioner states,

"The trial court having admitted substantial evidence of the petitioner's claims for such excess grading, it is axiomatic that the trial court should

have left said claims for the determination of the Jury."

(Parenthetically, we note that the petitioner refers to its claims as "claims for such *excess* grading", and likewise on page 18 of its brief, also describes its claims as being for *excess* grading,—proof that even the petitioner recognizes and, in unguarded moments, admits that its alleged claims relate to "extra" work and materials and not to "additional" work and materials.)

Of course, it is not "axiomatic that the trial court should have left said claims for the determination of the Jury".

The District Judge determined, and the Judges of the Circuit Court of Appeals have unanimously approved and confirmed such determination, that the City was entitled to judgment on these claims for alleged additional grading (in reality, claims for alleged "extra" grading) purely as a matter of law. If the District Judge had made such determination before the submission of evidence, it follows that no evidence would have been permitted. The error of the District Judge, if there was an error, was in allowing evidence to be submitted with respect to the claims in the first instance, not in withdrawing the claims from the consideration of the Jury. It is quite probable, however, that it was by hearing the evidence with respect to these claims that the District Judge became convinced that the claims were predicated upon theories and contentions wholly repugnant to the express provisions of the written contracts and that he at that time first realized that there was nothing to submit to the consideration of

the Jury, the City being entitled to judgment, as it had contended from the very inception of the case, purely as a matter of law.

For the reasons given by the District Judge when he withdrew the alleged claims for grading from the consideration of the Jury (R.3988-3989), we submit that his action was legally sound and that consequently the Circuit Court of Appeals did not err when it affirmed such action.

Concluding Statement

There is one portion of the opinion of the Circuit Court of Appeals which we believe it is appropriate for us to quote herein so that this Court may in a small measure apprehend the type of experience which the respondent City has had in its dealings with the petitioner. In the language of the Circuit Court of Appeals (R.4743):

"It is further without dispute that as the work progressed under the seven contracts the engineer made monthly estimates of work done and materials furnished, and the Construction Company was paid ninety per cent of his estimates. For more than six months the Construction Company each month received this ninety per cent payment for work done, materials furnished, and extra work. Its officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large additional claims. Under the theory now presented, the contractor

held back each month claims in excess of \$50,000.00 and accepted ninety per cent of the money on estimates of the engineer for work, materials, and extras, and this in the very teeth of the contracts which provide that claims be made known on or before the 25th of each month—the engineer's estimate day. This conduct of the Construction Company does not add up to open and fair dealings."

Should the petition for the writ of certiorari be granted, it would then become necessary for this Court to make an intensive study and analysis of thousands of pages of testimony and of voluminous exhibits and, upon the completion thereof, if the petitioner is to benefit from the allowance of the writ, to find numerous facts in direct conflict with those found by the Jury in the District Court, and to apply principles of law repugnant to those found by the District Judge and by three Judges of the Circuit Court of Appeals to be controlling herein.

It is to be borne in mind that the Jury reached its verdict only after many weeks of consideration of the facts herein. The trial before the Jury began on March 4, 1940 (R.353); the verdict of the Jury was not reached until more than three months later, on June 13, 1940 (R.4517). The verdict therefore represents most careful and profound thought and consideration by the Jury of every theory and contention which the petitioner was accorded every opportunity to present. Dissatisfied with the findings on one jury, the petitioner now asks this Court to set aside such findings and to require another jury to devote many additional weeks to consideration of the

same theories and the same contentions, hoping thereby to impress a second jury where it had failed utterly to impress the first. We submit that it is axiomatic that jury findings, made under the conditions which prevailed in the instant cause, are not set aside by appellate courts.

The Jury found that, based upon the facts, the petitioner is entitled to receive \$23,263.15, the precise amount which the respondent offered to pay to the petitioner fifteen years ago; the District Judge approved the findings of the Jury and also found \$23,263.15 to be the total amount to which the petitioner is legally entitled; three Judges of the Circuit Court of Appeals likewise decided unanimously that the petitioner's recovery herein should be \$23,263.15, plus interest thereon, not solely because of the findings made by the Jury but also and primarily as a matter of law.

We submit that it is conclusively established that justice has been done, that the findings of fact by the Jury and the conclusions and applications of law by the District Judge and by the three Judges of the Circuit Court of Appeals should not be disturbed, and that consequently the petition for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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